89-916

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

In The

Supreme Court of the United States

October Term, 1989

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LOREN DEAN KERNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

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QUESTION PRESENTED

I. Whether the respondent was in custody when questioned by a child protective investigator for the Illinois Department of Children and Family Services where the questioning took place at the police department before the respondent had been arrested.

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No. _____

In The

Supreme Court of the United States

October Term, 1989

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LOREN DEAN KERNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

The petitioner, People of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Fifth Judicial District, entered in the above-captioned proceedings on May 3, 1989.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth Judicial District, is reported at 183 Ill.App.3d 99, 538

N.E.2d 1223, and reproduced in the appendix hereto, App. 1, *infra*.

The initial opinion of the Appellate Court of Illinois, Fifth Judicial District, which was dated March 31, 1989, and which was vacated on May 3, 1989, is unreported. It is reproduced in the appendix hereto, App. 11, *infra*.

The order of the Circuit Court of the Fourth Judicial Circuit, Jasper County, Illinois, denying the respondent's motion to suppress his statements, is not reported. It is reproduced in the appendix hereto, App. 22, *infra*.

JURISDICTION

The judgment of the Appellate Court of Illinois, Fifth Judicial District was entered on March 31, 1989, reversing the respondent's convictions and remanding the case for further proceedings. The petitioner's petition for rehearing was filed on April 18, 1989, and denied on May 3, 1989, at which time the court filed a new opinion in the case. A timely petition for leave to appeal to the Illinois Supreme Court was denied on October 5, 1989. It is reproduced in the appendix hereto, App. 21, *infra*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On August 21, 1986, the respondent was charged with three counts of aggravated criminal sexual abuse for having fondled the vaginas of two young girls and the breasts of another, all of whom were under the age of 10. (C. 7-8) Prior to trial, the respondent filed a motion to suppress statements he made to a child protective investigator for the Illinois Department of Children and Family Services (hereinafter, DCFS) and to a police officer. (C. 46-53)

At the hearing on the motion to suppress, Boyd Vieregge testified that, as a child protective investigator for DCFS, he investigates reports of child abuse and neglect. (C. 293) On August 20, 1986, Vieregge went to Newton, Illinois, and interviewed the respondent pursuant to a report of sexual abuse of a child. (C. 293-94) Since there was no DCFS office in Newton, Vieregge made the police station his base of operations. (C. 298, 306, 319)

Vieregge was unable to find the respondent at home, but a police officer located him and asked him to meet

Vieregge at the police station. Upon the respondent's arrival at the station. Vieregge and the respondent spoke together, alone, in an office. (C. 295-96) Vieregge did not warn the respondent pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), nor did he make the respondent any promises or threaten him. (C. 298, 316-18) The respondent admitted fondling two children. (C. 300)

Newton police officer Lawrence Sroka testified that he contacted DCFS after he received a report of sexual abuse of a child. He directed another police officer to ask the respondent to come to the police station, but he remained in another room in a different part of the station while Vieregge and the respondent spoke. (C. 321-23, 329-31) At the conclusion of Vieregge's interview with the respondent, Officer Sroka arrested the respondent, gave him the *Miranda* warnings, and interrogated him based solely on his own investigation and without having discussed with Vieregge the contents of the latter's interview of the respondent. (C. 323-24, 326, 331, 333)

The respondent testified that police officer Brian Green asked him to go to the police station and that no one told him that he was under arrest until Officer Sroka arrested him after the respondent and Vieregge had ended their conversation. The respondent admitted that Vieregge made no promises to him. (C. 340-42, 345)

The trial court denied the respondent's motion to suppress, finding: (1) that Vieregge was neither a police officer nor an agent for the police; (2) that the respondent was not in custody when he spoke with Vieregge; and (3)

that the respondent's statements to Vieregge were voluntary. The court concluded that *Miranda* was not applicable to Vieregge's conversation with the respondent. (C. 359)

Evidence presented at a jury trial, which began February 26, 1987, supported the allegations against the respondent, and the respondent was convicted of all three charges. (C. 485 *et seq.*) Vieregge and Officer Sroka testified about the respondent's statements to them, and the respondent's written statement to Vieregge was admitted into evidence. (C. 626-29, 647-57) Subsequently, the trial court sentenced the respondent to imprisonment for seven years. (C. 144-46, 1127)

The respondent appealed his convictions and sentence. (C. 149-50) On March 31, 1989, the Appellant Court of Illinois, Fifth Judicial District, filed its opinion reversing the respondent's convictions and remanding the case for further proceedings concerning the voluntariness of the respondent's statement to Officer Sroka. In response to the petitioner's petition for rehearing, the court vacated its initial opinion and filed a new opinion on May 3, 1989, correcting an erroneous statement about the dates of the offenses. On October 5, 1989, the Supreme Court of Illinois denied the petitioner leave to appeal.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, WHICH IS AT ODDS WITH DECISIONS OF THIS COURT, IMPROPERLY APPLIED THE *MIRANDA* DECISION TO A STATIONHOUSE MEETING INVOLVING A PERSON NOT IN CUSTODY.

The court below held that statements the respondent made to an investigator for DCFS should have been suppressed because the investigator did not give the respondent the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The court determined that the respondent was in custody at the time. The holding was erroneous, however, because the defendant was not in custody when he spoke with the DCFS employee.

The record makes it clear that the respondent was not in custody when he spoke with Vieregge. Upon receiving a request that he go to the police station, the respondent drove his own car there. (C. 323, 335, 340) There was no formal arrest or restraint on the respondent's freedom of movement before or during his conversation with Vieregge. (C. 335, 342, 345) Vieregge had no authority to arrest or to detain anyone or to carry a weapon. His investigation was conducted for the purpose of determining whether there was a need to protect a child from her grandfather, the respondent. (C. 306, 492)

Although Vieregge was an employee of a state agency, he could not compel the respondent to submit to an interview. Thus, his position was far less intimidating than was that of the probation officer in *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), who, because of the court order granting Murphy

probation, could obligate Murphy's appearance for the purpose of answering questions.

Moreover, contrary to the lower court's opinion (*People v. Kerner*, 183 Ill.App.3d 99, 538 N.E.2d 1223, 1226, 131 Ill.Dec. 667, 670 (5th Dist. 1989)), the record contains absolutely no evidence that the door to the office where Vieregge was interviewing the defendant was ever locked while the defendant was in that office. Vieregge testified that he closed the door in order to have a quiet, private conversation with the defendant. (C. 648) The defendant testified that he did not even know whether the door was *closed* because his back was toward the door, and he did not hear the door close. (C. 708) Vieregge testified that he occupied the police chief's office because it was convenient and because it was the only private office in the station. (C. 315, 319-20)

In addition, the record fails to support the statement in the court's opinion that Officers Green and Sroka and the state's attorney "blocked the only exit from the office." 538 N.E.2d at 1226, 131 Ill.Dec. at 670. First of all, the state's attorney was not even at the police station during Vieregge's conversation with the defendant. (C. 633-34, 676, 707) Secondly, Green and Sroka were both in the dispatcher's office at that time. (C. 323, 330, 337-38, 625)

Officer Sroka's description of the physical layout of the police station revealed that the office in which Vieregge spoke with the defendant was at the end of a hallway. The dispatcher's office, where Sroka and Green were working while Vieregge was talking with the defendant, was located at the front of the building, at the end of the

hallway opposite the chief's office and through another door. (C. 323, 330, 337-38, 625) Hence, no one was "block[ing]" the exit from the office or from the building. Thus, the court below incorrectly concluded that the respondent was in custody and that the respondent's statements to Vieregge were admitted into evidence improperly. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983).

Furthermore, the lower court did not even mention this Court's opinions in *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), and *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). *Mathiason* and *Beheler*, involved stationhouse questioning by police officers under circumstances similar to Vieregge's interview of the respondent, and this Court concluded that the suspects in those cases were not in custody during those meetings. It is apparent that the lower court failed to consider *Mathiason* and *Beheler* when it held that the respondent was in custody; otherwise, it would have had to conclude that the respondent was not subjected to custodial interrogation.

Since the respondent was not in custody when Vieregge spoke with him, the court below erred in ruling that the respondent's statements were improperly admitted into evidence against him because he was not warned pursuant to *Miranda*. Accordingly, the decision below affords this Court the opportunity to correct the error in the holding that the *Miranda* warnings should have been given to a person not in custody or deprived of his freedom of movement in any respect.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX

183 Ill.App.3d 99
538 N.E.2d 1223

**PEOPLE of the State of Illinois,
Plaintiff-Appellee,**

v.

**Loren Dean KERNER,
Defendant-Appellant.**

No. 5-87-0351.

Appellate Court of Illinois,
Fifth District.

May 3, 1989.

Defendant was convicted in the Circuit Court, Jasper County, Richard H. Brummer, J., of aggravated criminal sexual abuse, and he appealed. The Appellate Court, Harrison, J., held that: (1) child-protective investigator with department of children and family services was acting as agent for prosecution when he questioned defendant about allegations of sexual abuse, so that *Miranda* warnings were required, and (2) defendant was not entitled to instruction on lesser included offense of battery.

Reversed and remanded.

Curtis G. Quindry, Newton, for defendant-appellant.

James Tomaw, State's Atty., Newton, Kenneth R. Boyle, Director, Stephen E. Norris, Deputy Director, Gerry R. Arnold, Sr. Staff Atty., Office of the State's Attys. Appellate Prosecutor, Mt. Vernon, for plaintiff-appellee.

Justice HARRISON delivered the opinion of the court:

After a jury trial, the circuit court of Jasper County sentenced the defendant on April 10, 1987, to a term of seven years' imprisonment for aggravated criminal sexual abuse in violation of section 12-16(c)(1) of the Criminal Code of 1961 (Ill.Rev.Stat. 1985, ch. 38, par. 12-16(c)(1)). The defendant appeals. We reverse the judgment and remand the cause for further proceedings.

The prosecution arose from allegations of sexual abuse made by three young girls, aged six, seven, and ten. The defendant was accused of having fondled the vaginas of two young girls at Sam Parr State Park in Newton, Illinois, on Sunday, August 3, 1986, and of having fondled the breasts of another young girl at Boys Baseball Park in Newton on Thursday, August 14, 1986. At trial, Boyd Vieregge, a child-protective investigator with the Department of Children and Family Services [DCFS], testified that he had received a report from one of the children that the defendant had committed "bad touches" upon her on at least five occasions. Vieregge contacted Officer Lawrence Sroka of the Newton Police Department, who told Vieregge that the Newton police were also investigating the defendant. Vieregge requested the officer to assist in setting up a meeting with the defendant at the police station.

On August 20, 1986, Vieregge met the defendant, who had been escorted to the Newton police station by Officer Bryan Green, to discuss the allegations of child abuse. While the defendant spoke with Vieregge in the office of the Newton chief of police, Officers Green and

Sroka and the State's Attorney waited outside of the office. Vieregge advised the defendant that he would have to notify the police and the State's Attorney if the defendant inculpated himself in the criminal activity, but did not advise the defendant that he had the right to remain silent and the right to an attorney. The defendant then spoke with Vieregge for approximately one and one-half hours, and made several incriminating remarks during the interview. Vieregee asked the defendant if he would execute a written statement, and the defendant subsequently executed a statement inculpating himself in the alleged offense. Officer Sroka then entered the chief-of-police's office and arrested the defendant.

Subsequent to placing the defendant under arrest, Officer Sroka admonished the defendant pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and interrogated him regarding the alleged abuse. The defendant then made some incriminating remarks to Sroka, which Sroka testified to during the trial.

The defendant argues on this appeal that: (1) the trial court erred by admitting in evidence the statement taken by Vieregge, an investigator for the DCFS, without Vieregge's having admonished the defendant pursuant to *Miranda;* (2) the trial court erred by allowing Officer Sroka to testify to an oral statement taken from the defendant immediately after the statement given to Vieregge; (3) the trial court erred by refusing to give jury instructions defining the offense of battery; and (4) the trial court abused its discretion in sentencing the defendant to a term of seven years' imprisonment.

The defendant initially contends that the trial court erred by admitting in evidence a statement that he executed at the request of Vieregge of the DCFS in the office of the Newton chief of police on August 20, 1986. The defendant asserts that Vieregge acted as an investigative officer for purposes of *Miranda* without having admonished the defendant pursuant to *Miranda*. On February 24, 1987, the circuit court denied the defendant's pretrial motion to suppress the written statement, and the statement was admitted over objection as State's exhibit number four.

In *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706, the Supreme Court held that a prosecutor may not use an exculpatory or inculpatory statement arising from a custodial interrogation of a defendant unless the prosecutor can demonstrate the use of procedural safeguards effective to secure the defendant's privilege against incriminating himself. The *Miranda* decision requires the agent of the prosecution to warn the defendant prior to questioning that: (1) he has the right to remain silent; (2) anything he says can be used against him in a court of law; (3) he has the right to have an attorney present; and (4) if he cannot afford an attorney one will be appointed for him prior to questioning if he so desires. *Miranda*, 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

Previous case law indicates that the *Miranda* decision applies to any interrogating party who acts as an agent of the prosecution. In *People v. Baugh* (1974), 19 Ill. App.3d 448, 451, 311 N.E.2d 607, 609, *cert. denied* (1975), 421 U.S. 920, 95 S.Ct. 1587, 43 L.Ed.2d 789, the appellate court held that the trial court must exclude statements resulting

from an interrogation of a defendant when the interrogating party failed to admonish the defendant pursuant to *Miranda*, and the interrogating party's "interests were so integrated and closely aligned with the authorities that his role in [the] case was adversary in nature and his conduct and questions directed at defendant were accusatory in character."

In *People v. Hagar* (1987), 160 Ill.App.3d 370, 112 Ill.Dec. 214, 513 N.E.2d 628, a case with facts similar to those of the instant case, the appellate court affirmed the trial court's suppression of a statement given to two DCFS investigators by a defendant charged with aggravated criminal sexual assault. The *Hagar* court distinguished *People v. Bradley* (1984), 128 Ill.App.3d 372, 83 Ill.Dec. 701, 470 N.E.2d 1121, a case where the appellate court determined that the trial court did not err by denying the defendant's motion to suppress a statement taken by a DCFS caseworker who received a defendant's incriminating statement without admonishing the defendant pursuant to *Miranda*. In *Hagar*, the defendant made the statement in a custodial environment, where in *Bradley* the defendant made the statement at his home. Additionally, in *Hagar* the DCFS employees were "investigators" whose role was to inquire into abuse and neglect charges, and to instigate charges where appropriate, where in *Bradley* the DCFS employee was a "caseworker" whose role was to counsel the defendant, and not to solicit or encourage the incriminating remarks. *Hagar*, 160 Ill. App.3d at 375, 112 Ill.Dec. at 217, 513 N.E.2d at 631.

In the case *sub judice*, as in *Hagar*, the DCFS employee was an investigator, and interviewed the defendant as part of his investigation for the DCFS. Vieregge admitted

during the pre-trial suppression hearing that he was "required by law to notify the [S]tate's [A]ttorney and the police department of the complaint". Vieregge told the defendant that he would have to notify the police and the State's Attorney if the defendant's statements indicated criminal activity. Vieregge was thus prepared, subsequent to taking the defendant's statement, to assist the police and the State's Attorney in their prosecution of the defendant. The defendant executed his written statement on a form Vieregge obtained from the Newton police. Officers Sroka and Green, and the State's Attorney, waited for Vieregge to finish interviewing the defendant before entering the room, where Officer Sroka immediately arrested the defendant. Furthermore, Vieregge exchanged information with Officer Sroka, who was handling the criminal investigation of the defendant, both before and after Vieregge's interview with the defendant. These factors indicate that Vieregge's role in the investigation was integrated with that of the Newton officers and the State's Attorney, and adverse to the interests of the defendant. Vieregge acted as a "conduit for information elicited from defendant and used by the authorities in the prosecution of defendant." (*People v. Baugh* (1974), 19 Ill.App.3d 448, 451, 311 N.E.2d 607, 609.) Thus, Vieregge was an agent of the prosecution for purposes of *Miranda*.

We also note that the the setting of the investigation was custodial in nature. The *Miranda* decision applies only to "custodial" interrogations, which the Court defined as "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning * * *." (*Miranda*, 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed.2d at

726.) The determination of whether the defendant was in custody at the time of the interrogation depends on several relevant factors, including: (1) the place of the interrogation; (2) statements or nonverbal conduct indicating an accused is not free to leave; (3) the extent of the knowledge of the officers and the focus of their investigation; and (4) the intention of the officers. (*People v. Newsome* (1983), 117 Ill.App.3d 1005, 1007-08, 73 Ill.Dec. 493, 495, 454 N.E.2d 353, 355.) In the instant case, the circumstances of Vieregge's interrogation indicate that the defendant was in a custodial setting during the questioning. Vieregge interrogated the defendant in the office of the chief of police. The door of the office was kept closed and locked at all times. Officers Green and Sroka, and the State's Attorney, blocked the only exit from the office. Vieregge had information regarding the defendant's culpability of the offense prior to the questioning, and the focus of Vieregge's investigation was at all times upon the defendant. Officer Sroka intended to arrest the defendant, and did arrest the defendant, immediately after the interview. Thus we find, from the factors prescribed in *Newsome*, that the defendant was in custody for purposes of *Miranda*.

The standard of review for a motion to suppress is whether the finding of the trial court was manifestly erroneous. (*People v. Brown* (1980), 88 Ill.App.3d 514, 519, 43 Ill.Dec. 505, 509, 410 N.E.2d 505, 509, *cert. denied* (1981), 451 U.S. 1019, 101 S.Ct. 3010, 69 L.Ed.2d 392.) Vieregge's role in the interrogation clearly indicates that he was an instrumentality of the prosecution, and the evidence indicates that the interrogation took place while the defendant was "in custody" for purposes of *Miranda*.

Consequently, Vieregge was required to give *Miranda* warnings to the defendant prior to interrogating him. The trial court's failure to suppress Vieregge's statement was manifestly erroneous, and we must therefore reverse the court's judgment and remand the cause for a new trial.

The defendant's second contention is that the trial court erred by allowing Officer Sroka to testify to an oral statement of the defendant taken immediately after the statement to Vieregge. The trial court denied the defendant's pretrial motion to suppress the statement to Sroka and Sroka testified at trial as to the defendant's statement. The defendant objected to Officer Sroka's testifying because the defendant alleged that the statement made to Sroka was "fruit of the poisonous tree" obtained from Vieregge, and the statement was thus tainted by Vieregge's failure to give *Miranda* warnings.

"Under Illinois law, the admissibility of defendant's subsequently warned confession after an initial *Miranda* violation depends upon the voluntariness of the second statement. [Citation.] Voluntariness is determined after a consideration of the totality of the circumstances and depends upon whether the accused's will was overborne at the time of the statement. [Citations.] The fact that the first statement is inadmissible does not automatically render a subsequent statement inadmissible." (*People v. Fuller* (1986), 141 Ill.App.3d 737, 744, 95 Ill.Dec. 885, 891, 490 N.E.2d 977, 983.) We are unable to determine from the record whether the defendant made his statement to Officer Sroka voluntarily. Upon remand, the court should conduct a rehearing to determine the voluntariness of the defendant's statement to Sroka.

The defendant next contends that the trial court erred by refusing to give jury instructions defining the offense of battery. The record indicates that the defendant tendered proposed jury instructions setting forth the elements of battery, accompanied by verdict forms for battery. The court sustained the State's objection to these instructions and the instructions were not given to the jury.

Section 12-3(a) of the Criminal Code of 1961 (Ill.Rev.Stat. 1985, ch. 38, par. 12-3(a)) defines battery as where an individual "intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." In *People v. Reynolds* (1987), 152 Ill.App.3d 216, 218, 105 Ill.Dec. 294, 296, 504 N.E.2d 163, 165, the appellate court acknowledged that a defendant may be entitled to instruct a jury on a lesser included offense. However, the court noted that the evidence must permit a jury rationally to find the defendant guilty of the lesser offense and not guilty of the greater offense. (*Reynolds*, 152 Ill.App.3d at 218, 105 Ill.Dec. at 296, 504 N.E.2d at 165.) The *Reynolds* court determined that the record failed to indicate any evidence under which the jury could find the defendant guilty of the lesser offense of attempted burglary because the evidence was clear that someone had burglarized the victim's house. The court concluded that, when the evidence indicates that a defendant is either guilty of the greater offense or not guilty of any offense, the court may properly refuse an instruction on the lesser offense. *Reynolds*, 152 Ill.App.3d at 219, 105 Ill.Dec. at 296, 504 N.E.2d at 165.

In the instant case, the court properly refused to give the instruction on the lesser offense of battery because the defendant is either guilty of the greater offense of aggravated criminal sexual abuse or not guilty of any offense. The defendant has consistently argued that he did not touch the victims' sex organs or breasts, or, if he had, that the touching was unintentional. If the jury believed the defendant's version of the facts, then it could only conclude that he had not committed any offense. The only other possibility is that the touching was intentional. If there were an intentional touching, under the evidence presented, the touching of the victims' sex organs or breasts could only have been for sexual gratification. Thus the defendant would have committed aggravated criminal sexual abuse, not merely battery. Accordingly, the jury could either find the defendant guilty of aggravated criminal sexual abuse or find him not guilty of any offense. The trial court therefore correctly refused to give the instruction for battery.

The defendant's final contention is that the trial court abused its discretion in sentencing him to an extended term of seven years' imprisonment. We need not rule on this point since we are reversing the lower court's judgment and remanding the cause for a new trial.

For the foregoing reasons, we reverse the judgment of the circuit court of Jasper County and remand the cause for further proceedings.

REVERSED AND REMANDED.

WELCH, P.J., and HOWERTON, J., concur.

NO. 5-87-0351

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the) Circuit Court) of Jasper County.
Plaintiff-Appellee,	) No. 86-CF-28
vs.	) Honorable Richard H.
LOREN DEAN KERNER,	) Brummer, Judge) Presiding.
Defendant-Appellant.	) (Filed March 31, 1989)

JUSTICE HARRISON delivered the opinion of the court:

After a jury trial, the circuit court of Jasper County sentenced the defendant on April 10, 1987, to a term of seven years' imprisonment for aggravated criminal sexual abuse in violation of section 12-16(c)(1) of the Criminal Code of 1961 (Ill.Rev.Stat.1985, ch.38, par.12-16(c)(1)). The defendant appeals. We reverse the judgment and remand the cause for further proceedings.

The prosecution arose from allegations of sexual abuse made by three young girls, aged six, seven, and ten. The defendant was accused of having fondled the vagina of one of the young girls at Sam Parr State Park in Newton, Illinois, on Sunday, August 3, 1986, and of having fondled the vagina of one young girl and the breasts of another young girl at Boys Baseball Park in Newton on Thursday, August 14, 1986. At trial, Boyd Vieregge, a child-protective investigator with the Department of Children and Family Services [DCFS], testified that he

had received a report from one of the children that the defendant had committed "bad touches" upon her on at least five occasions. Vieregge contacted Officer Lawrence Sroka of the Newton Police Department, who told Vieregge that the Newton police were also investigating the defendant. Vieregge requested the officer to assist in setting up a meeting with the defendant at the police station.

On August 20, 1986, Vieregge met the defendant, who had been escorted to the Newton police station by Officer Bryan Green, to discuss the allegations of child abuse. While the defendant spoke with Vieregge in the office of the Newton chief of police, Officers Green and Sroka and the State's Attorney waited outside of the office. Vieregge advised the defendant that he would have to notify the police and the State's Attorney if the defendant inculpated himself in the criminal activity, but did not advise the defendant that he had the right to remain silent and the right to an attorney. The defendant then spoke with Vieregge for approximately one and one-half hours, and made several incriminating remarks during the interview. Vieregge asked the defendant if he would execute a written statement, and the defendant subsequently executed a statement inculpating himself in the alleged offense. Officer Sroka then entered the chief-of-police's office and arrested the defendant.

Subsequent to placing the defendant under arrest, Officer Sroka admonished the defendant pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, and interrogated him regarding the alleged abuse. The defendant then made some incriminating

remarks to Sroka, which Sroka testified to during the trial.

The defendant argues on this appeal that: (1) the trial court erred by admitting in evidence the statement taken by Vieregge, an investigator for the DCFS, without Vieregge's having admonished the defendant pursuant to *Miranda*; (2) the trial court erred by allowing Officer Sroka to testify to an oral statement taken from the defendant immediately after the statement given to Vieregge; (3) the trial court erred by refusing to give jury instructions defining the offense of battery; and (4) the trial court abused its discretion in sentencing the defendant to a term of seven years' imprisonment.

The defendant initially contends that the trial court erred by admitting in evidence a statement that he executed at the request of Vieregge of the DCFS in the office of the Newton chief of police on August 20, 1986. The defendant asserts that Vieregge acted as an investigative officer for purposes of *Miranda* without having admonished the defendant pursuant to *Miranda*. On February 24, 1987, the circuit court denied the defendant's pretrial motion to suppress the written statement, and the statement was admitted over objection as State's exhibit number four.

In *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706, the Supreme Court held that a prosecutor may not use an exculpatory or inculpatory statement arising from a custodial interrogation of a defendant unless the prosecutor can demonstrate the use of procedural safeguards effective to secure the defendant's privilege against incriminating himself.

The *Miranda* decision requires the agent of the prosecution to warn the defendant prior to questioning that: (1) he has the right to remain silent; (2) anything he says can be used against him in a court of law; (3) he has the right to have an attorney present; and (4) if he cannot afford an attorney one will be appointed for him prior to questioning if he so desires. *Miranda*, 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

Previous case law indicates that the *Miranda* decision applies to any interrogating party who acts as an agent of the prosecution. In *People v. Baugh* (1974), 19 Ill.App.3d 448, 451, 311 N.E.2d 607, 609, *cert. denied* (1975), 421 U.S. 920, 95 S.Ct. 1587, 43 L.Ed.2d 789, the appellate court held that the trial court must exclude statements resulting from an interrogation of a defendant when the interrogating party failed to admonish the defendant pursuant to *Miranda*, and the interrogating party's "interests were so integrated and closely aligned with the authorities that his role in [the] case was adversary in nature and his conduct and questions directed at defendant were accusatory in character."

In *People v. Hagar* (1987), 160 Ill.App.3d 370, 513 N.E.2d 628, a case with facts similar to those of the instant case, the appellate court affirmed the trial court's suppression of a statement given to two DCFS investigators by a defendant charged with aggravated criminal sexual assault. The *Hager* court distinguished *People v. Bradley* (1984), 128 Ill.App.3d 372, 470 N.E.2d 1121, a case where the appellate court determined that the trial court did not err by denying the defendant's motion to suppress a statement taken by a DCFS caseworker who received a defendant's incriminating statement without

admonishing the defendant pursuant to *Miranda*. In *Hagar*, the defendant made the statement in a custodial environment, where in *Bradley* the defendant made the statement at his home. Additionally, in *Hagar* the DCFS employees were "investigators" whose role was to inquire into abuse and neglect charges, and to instigate charges where appropriate, where in *Bradley* the DCFS employee was a "caseworker" whose role was to counsel the defendant, and not to solicit or encourage the incriminating remarks. *Hagar*, 160 Ill.App.3d at 375, 513 N.E.2d at 631.

In the case *sub judice*, as in *Hagar*, the DCFS employee was an investigator, and interviewed the defendant as part of his investigation for the DCFS. Vieregge admitted during the pretrial suppression hearing that he was "required by law to notify the [S]tate's [A]ttorney and the police department of the complaint". Vieregge told the defendant that he would have to notify the police and the State's Attorney if the defendant's statements indicated criminal activity. Vieregge was thus prepared, subsequent to taking the defendant's statement, to assist the police and the State's Attorney in their prosecution of the defendant. The defendant executed his written statement on a form Vieregge obtained from the Newton police. Officers Sroka and Green, and the State's Attorney, waited for Vieregge to finish interviewing the defendant before entering the room, where Officer Sroka immediately arrested the defendant. Furthermore, Vieregge exchanged information with Officer Sroka, who was handling the criminal investigation of the defendant, both before and after Vieregge's interview with the defendant. These factors indicate that Vieregge's role in the investigation was

integrated with that of the Newton officers and the State's Attorney, and adverse to the interests of the defendant. Vieregge acted as a "conduit for information elicited from defendant and used by the authorities in the prosecution of defendant." (*People v. Baugh* (1974), 19 Ill.App.3d 448, 451, 311 N.E.2d 607, 609.) Thus Vieregge was an agent of the prosecution for purposes of *Miranda*.

We also note that the the [sic] setting of the investigation was custodial in nature. The *Miranda* decision applies only to "custodial" interrogations, which the Court defined as "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning * * * ." (*Miranda*, 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.) The determination of whether the defendant was in custody at the time of the interrogation depends on several relevant factors, including: (1) the place of the interrogation; (2) statements or nonverbal conduct indicating an accused is not free to leave; (3) the extent of the knowledge of the officers and the focus of their investigation; and (4) the intention of the officers. (*People v. Newsome* (1983), 117 Ill.App.3d 1005, 1007-08, 454 N.E.2d 353, 355.) In the instant case, the circumstances of Vieregge's interrogation indicate that the defendant was in a custodial setting during the questioning. Vieregge interrogated the defendant in the office of the chief of police. The door of the office was kept closed and locked at all times. Officers Green and Sroka, and the State's Attorney, blocked the only exit from the office. Vieregge had information regarding the defendant's culpability of the offense prior to the questioning, and the focus of Vieregge's investigation was at all times upon the defendant.

Officer Sroka intended to arrest the defendant, and did arrest the defendant, immediately after the interview. Thus we find, from the factors prescribed in *Newsome*, that the defendant was in custody for purposes of *Miranda*.

The standard of review for a motion to suppress is whether the finding of the trial court was manifestly erroneous. (*People v. Brown* (1980), 88 Ill.App.3d 514, 519, 410 N.E.2d 505, 509, *cert. denied* (1981), 451 U.S. 1019, 101 S.Ct. 3010, 69 L.Ed.2d 392.) Vieregge's role in the interrogation clearly indicates that he was an instrumentality of the prosecution, and the evidence indicates that the interrogation took place while the defendant was "in custody" for purposes of *Miranda*. Consequently, Vieregge was required to give *Miranda* warnings to the defendant prior to interrogating him. The trial court's failure to suppress Vieregge's statement was manifestly erroneous, and we must therefore reverse the court's judgment and remand the cause for a new trial.

The defendant's second contention is that the trial court erred by allowing Officer Sroka to testify to an oral statement of the defendant taken immediately after the statement to Vieregge. The trial court denied the defendant's pretrial motion to suppress the statement to Sroka and Sroka testified at trial as to the defendant's statement. The defendant objected to Officer Sroka's testifying because the defendant alleged that the statement made to Sroka was "fruit of the poisonous tree" obtained from Vieregge, and the statement was thus tainted by Vieregge's failure to give *Miranda* warnings.

"Under Illinois law, the admissibility of defendant's subsequently warned confession after an initial *Miranda* violation depends upon the voluntariness of the second statement. [Citation.] Voluntariness is determined after a consideration of the totality of the circumstances and depends upon whether the accused's will was overborne at the time of the statement. [Citations.] The fact that the first statement is inadmissible does not automatically render a subsequent statement inadmissible." (*People v. Fuller* (1987), 141 Ill.App.3d 734, 744, 490 N.E.2d 977, 983.) We are unable to determine from the record whether the defendant made his statement to Officer Sroka voluntarily. Upon remand, the court should conduct a rehearing to determine the voluntariness of the defendant's statement to Sroka.

The defendant next contends that the trial court erred by refusing to give jury instructions defining the offense of battery. The record indicates that the defendant tendered proposed jury instructions setting forth the elements of battery, accompanied by verdict forms for battery. The court sustained the State's objection to these instructions and the instructions were not given to the jury.

Section 12-3(a) of the Criminal Code of 1961 (Ill.Rev.Stat. 1985, ch. 38, par. 12-3(a)) defines battery as where an individual "intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." In *People v. Reynolds* (1987), 152 Ill.App.3d 216, 218, 504 N.E.2d 163, 165, the appellate court acknowledged that a defendant may be entitled to instruct a jury on a lesser

included offense. However, the court noted that the evidence must permit a jury rationally to find the defendant guilty of the lesser offense and not guilty of the greater offense. (*Reynolds*, 152 Ill.App.3d at 218, 504 N.E.2d at 165.) The *Reynolds* court determined that the record failed to indicate any evidence under which the jury could find the defendant guilty of the lesser offense of attempted burglary because the evidence was clear that someone had burglarized the victim's house. The court concluded that, when the evidence indicates that a defendant is either guilty of the greater offense or not guilty of any offense, the court may properly refuse an instruction on the lesser offense. *Reynolds*, 152 Ill.App.3d at 219, 504 N.E.2d at 165.

In the instant case, the court properly refused to give the instruction on the lesser offense of battery because the defendant is either guilty of the greater offense of aggravated criminal sexual abuse or not guilty of any offense. The defendant has consistently argued that he did not touch the victims' sex organs or breasts, or, if he had, that the touching was unintentional. If the jury believed the defendant's version of the facts, then it could only conclude that he had not committed any offense. The only other possibility is that the touching was intentional. If there were an intentional touching, under the evidence presented, the touching of the victims' sex organs or breasts could only have been for sexual gratification. Thus the defendant would have committed aggravated criminal sexual abuse, not merely battery. Accordingly, the jury could either find the defendant guilty of aggravated criminal sexual abuse or find him not guilty of any

offense. The trial court therefore correctly refused to give the instruction for battery.

The defendant's final contention is that the trial court abused its discretion in sentencing him to an extended term of seven years' imprisonment. We need not rule on this point since we are reversing the lower court's judgment and remanding the cause for a new trial.

For the foregoing reasons, we reverse the judgment of the circuit court of Jasper County and remand the cause for further proceedings.

REVERSED AND REMANDED.

WELCH, P.J., and HOWERTON, J., concur.

68725

ILLINOIS SUPREME COURT
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October 5, 1989

State's Attorneys Appellate Prosecutor
Fifth Judicial District
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No. 68725 – People State of Illinois, petitioner, v. Loren Dean Kerner, respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 27, 1989.

Order of the Circuit Court of the Fourth Judicial Circuit, Jasper County, Illinois, denying the respondent's motion to suppress his statements

Dated: February 24, 1987

* * *

(p. 70) THE COURT: The Court has heard the testimony of the Motion to Suppress. Both of the suppressions will be denied. The Court finds that Mr. Vieregge was not a police officer, he did not act as an agent for a police officer, he was not assuming some role as a police officer, that the defendant, Kerner, was not in custody at the time he was questioned by Vieregge. There had been no restraints. He had driven up to the police station himself. And in fact, apparently Vieregge was investigating a questioning of abuse with regard to Kara Kerner, primarily.

The Court finds that this was a voluntary statement to Mr. Vieregge, that the Miranda requirements are not applicable. With regard to Officer Sroka, the Court (p. 71) finds that the Miranda warnings were given, the statements made, the oral statements were not somehow violative of Miranda requirements inasmuch as they were given after – statements were given after the Miranda warnings. The Court does not find that the statements were involuntary in any fashion; in fact, finds that they were voluntary.

With regard to those statements somehow being the product of the Vieregge investigation, the testimony was clear that there was no communication between the two other than the time Mr. Vieregge spoke with Mr. Kerner and Mr. Sroka – or Officer Sroka subsequently placing

Mr. Kerner under arrest. In fact, Officer Sroka was investigating allegations of abuse with regard to a Lori Gorrell and a Wendy Gorrell, and Mr. Vieregge with regard to a different individual, a Kara Kerner.

For those reasons, the Court finds that the statements were voluntary, not violative of Miranda, and the Motion to Suppress will be denied.

* * *